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Supreme Court, U.S.
FILED

941633 APR 3 - 1995

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DUANE C. BAKER,

Petitioner,

v.

DONNA L. BAKER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE
COURT OF APPEALS
STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

1. Whether the use of religion in any consideration of award of child custody is contrary to the First Amendment of the United States Constitution?

2. Whether the educational degree enhanced earning capacity lifetime awards given to the non-degree holding spouse in New York's DRL § 236, Pt. B, Subd. 6, is contrary to the Thirteenth Amendment of the United States Constitution as determined by Florida courts in Severs v. Severs, 426 So.2d 992?

3. Whether the inclusion of income from extra hours worked from overtime, nights, and holidays, into enhanced earning capacity cases is contrary to the Thirteenth Amendment of the United States Constitution?

4. Whether such distributive awards given on educational degrees are contrary to the Fourth Amendment of the United States Constitution as degrees are not property and are exclusively personal to the holder?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Duane Baker, prays that a Writ of Certiorari issue to review the Judgement of the Court of Appeals of the State of New York entered in this case on January 17, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, which is unreported, is set forth at A. (1a)[1].

JURISDICTION

The judgement of the Court of Appeals of the State of New York was entered on January 17, 1995. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1257.

STATUTES INVOLVED

The text of the following statutes relevant to the determination of the present case, are set forth below:

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[1] References to "A." are to the appendix to this petition.

AMENDMENT I of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for redress of grievances.

AMENDMENT IV of the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmantion, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIII of the United States Constitution

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.

AMENDMENT XIV of the United States Constitution

Section 1. ... No State shall make or enforce any law which shall abridge the priviledges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Duane Baker was the defendant of a divorce case in the state of New York. New York did not have no-fault divorce options at that time. The plaintiff was to pursue her action for divorce on an uncontested basis under the agreement amd motion that there would not be any prejudice to any other issues in the divorce.

During the trial the Plaintiff's lawyer declared that Dr. Baker should not share in any legal custody of his children explaining,

"As an example, religion, all right, they are not in agreement about religion.... Mrs. Baker is converting to Catholocism and is going to have the children baptized in the the Catholic religion. Dr. Baker, as I understand it, is either not practicing in any religion or does not believe in any religion, or whatever.... I do know he is not a Catholic. I know he is not converting to Catholocism."

Finonocchio, Trial Transcript vol. II, pgs. 143 - 144.

This was the only reason the plaintiff gave for denying Dr. Baker any custody of his children. At the end of the trial Donna Baker was awarded full legal custody of the children (Judge Hayes, Trial transcript p. 884), and

therefore Dr. Baker was not entitled to have any legal custody of his children, nor was he allowed to make any legal decisions to help guide them through the rest of their lives.

It is was later discovered by the Petitioner that Hon. Leo F. Hayes is a devout Catholic and his brother is a priest.

Dr. Baker's Medical Degree was totally financed by the United States Air Force, his parents, and personal loans which he is soley responsible for. Dr. Baker's parents totally financed his first year of medical school. Under 10 U.S.C. § 2120 - 2127, Chapter 105 - "Armed Forces Health Professions Scholarship Program" the Air Force totally paid for the remaining years, tuition, books, and fees, while also providing a stipend to live on. No marital funds were used to repay any of these sources. In addition Dr. Baker's parents bought him and his wife a car and totally financed his wife's (the plaintiff's) last year of college.

Furthermore, Dr. Baker expended every reasonable measure to support his wife in

obtaining another degree (Registered Dietitian) during the marriage, including giving her their only car and traveling great distances to move her up to Yale. The day prior to her starting her program she quit. She had an additional chance to obtain this degree during the marriage was enrolled and started part of her program and quit again.

At the divorce trial Donna Baker testitified to having completed her studies except for one exam and was already employed in the career field of her choice.

Judge Leo F. Hayes awarded Donna Baker, the Plaintiff, $142,000.00 as part of the enhanced eanings Duane Baker would make as a result of his medical degree. Donna Baker was also awarded attorney's fees and maintenence. The maintenance included all mortgage, taxes and insurance, and all basic utility expences to maintain the marital residence (Appendix 29a, 33a - 34a).

REASONS FOR GRANTING THE WRIT

I. The New York Judicial System has rendered a decision that is in conflict with the United

States Constitution, four Constitutional Ammendments, and other State Courts.

A. The use of religion in any consideration of award of child custody is contrary to the First Amendmendment of the United States Constitution.

This is so clearly unjust it does not require a cite. It was clearly determined during the trial that Dr. Baker is a Physician, his father is a physician and his family has history of service to this country. Dr. Baker was in the United States Air Force and served in Desert Storm, while his father and each of his three brothers also served this country in the military. Certainly this would entitle Dr. Baker to be able to take part in guiding his children's future. Criminals, drug addicts, and child abusers have been given greater rights.

The use of religious prejudice in this case merits review by this court without awaiting further resolve of any issues by a clearly prejudiced trial court. It is also submitted that this unjust prejudice was a guiding factor

in not only the award of child support but also in the determination of the rest of the decision. Any return of issues will only result in further unjustly colored decisons by the trial court and continue to be contrary to Dr. Baker's First Amendment rights. This also merits an award to Dr. Baker the releif requested within this writ (which includes physical custody of his children.

B. The State of New York improperly awarded the plaintiff a share of the enhanced value of Dr. Baker's medical license as the Thirteenth Amendment of the United States Constitution provides protection against involuntary servitude.

In the case of Severs v. Severs, 426 So.2d 992 (1983), the wife worked

> . . . to assist her husband in achieving his law degree. After his graduation and entry into private practice, the wife abandoned her career and devoted full time to being a housewife and mother. Id. at 992.
>
> The wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution. Id. at 994.

In this case of Baker v. Baker, there is not any documentation of the plaintiff making any contribution to the degree as third parties totally financed the defendant's degree. In addition the defendant secured over $100,000.00 in loans which he alone is responsible for.

Regardless of the wife's contribution, the ruling of Severs, makes an enhanced earning calculation award a violation of of Amendment XIII of the United States Constitution.

Furthermore, the Supreme Court in this case utilized earnings over Dr. Baker's entire work life expectancy for the calculations (Appendix pg. 9a and 13a). This indentures Dr. Baker into a lifetime bond of involuntary servitude creating an even greater injustice contrary to Amendment XIII of the United States Constitution.

C. The State of New York has improperly determined that degrees are property, therefore the enhanced earning capacity award on a degree is contrary to Amendment IV of the United States Constitution.

Amendment IV of the United States Constitution states that the people have the right,

"to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,...."

The State of New York has artificially determined that degrees are property contrary to other states' opinions. The arguments by most courts against awarding a portion of a degree are best stated in the cases below. Each case involved a spouse wanting a portion of enhanced earning capacity from a degree acquired during a marriage.

"It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term."

In re. Marriage of Graham, 194 Col. 429, 432; 574 P.2d 75, 77.

"By classifying an education or degree as property, the courts, in reality, treat as property the future enhanced earning capacity that may result from the education. Enhanced earning capacity is not property. It is not vested; it is only an uncertain expectancy, for it is dependent upon the future success and efforts of degree holder."

Lesman vs. Lesman, 452 N.Y.S.2d 935,938; 88 A.D.2d 153.

"Appellate courts have passed upon the issue. The majority view is that these items are not property and that a wife who contributes to her husband's professional education may not, upon divorce receive an award for her contributions."

Lesman, page 937 (For a list of 13 references, see Lesman v. Lesman supra page 937).

"Most courts which have considered this question have held and we agree, that an educational degree is not property because, '. . . it does not have an exchange value on an open market or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and was not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. . .' It could not be acquired by mere expenditure of money."

GrossKoph v. GrossKoph 677 P.2d 814, 816.

"Professional degree should not be equated with goodwill which as we noted in Stern, may, in given case, add economic worth to a property interest. Stern v. Stern, 66 N.J. at 346-47 n. 5, 331; A.2d 257 (1975).

The value of a professional degree for purposes of property distribution is nothing more than possibility of enhanced earnings that the particular academic credential will provide. In Stern v. Stern, 66 N.J. at 346-47 n. 5, 331; A.2d

257 (1975), we held that a lawyer's "earning capacity, even where its development has been aided and enhanced by the other spouse . . . should not be recognized as a separate, particular item of property . . . . Potential earning capacity . . . should not be deemed property ...." Moreover, any assets resulting from income for professional services would be property acquired after the marriage; the statute restricts equitable distribution to property acquired DURING the marriage. N.J.S.A. 2A:34-23.

Mahoney v. Mahoney, 453 A.2d 527,532.

In Lesman vs. Lesman, 452 N.Y.S.2d 935,938; 88 A.D.2d 153, the wife was attempting to achieve a portion of her husband's medical degree. She was denied her request on the basis of most of the arguments above and with the following explanation included:

"Every unsuccessful marriage results in the disappointment of expectations, financial as well as non-financial, but it does not result in a financial loss in a commercial sense. The wife, by contributing to her husband's education, follows a plan agreed upon for the joint benefit of both spouses. 'If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectations by itself as any more compensable or demanding of solicitude than the loss of expectaions of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and labor in a failed marriage.' (Mahoney v. Mahoney, 182 N.J.Super.598, 614; 442 A.2d 1062, supra.)"

Lesman, at 940-941.

Mrs. Lesman was granted custody of the children. Lesman, at 937. Therefore Dr. Lesman lost expectations of his relationship and of the joy of raising his two children. He was not compensated for his loss of expectations, as Mrs. Lesman was not compensated for her loss of expectations of future financial gain.

Like Dr. Lesman, Duane Baker, the Defendant, also lost any expectations he had of the marital relationship and lost part of the joy of raising his three children as custody was given to their mother.

Dr. Lesman's "full cost of tuition, books, and other school expenses for his medical education was approximately twenty-five to thirty thousand dollars. This was paid for by the husband from his savings, a New York State Higher education loan and personal loans. In 1972 or 1973, the wife went to New York for a period of five months where she worked . . . . There is no indication that she contributed any of this amount to her husband." Lesman, 936-937.

In this case, Baker v. Baker, there isn't any documentation of the plaintiff making any contribution to the degree as in fact, third parties totally financed the Defendant's/Appellant's degree. In addition, Dr. Baker secured over $100,000.00 in loans which he alone is responsible for.

D. The State of New York has improperly determined that Dr. Baker's degree was marital property, therefore the enhanced earning capacity award was contrary to Amendment IV of the United States Constitution.

Even if one improperly considers a degree property, then the same rules of property should apply. Even by the rules of property Dr. Baker's degree is not marital property and therefore the enhanced earning capacity is contrary to his Amendment IV rights. Some of the examples discussed below may not necessarily be degrees. However, if one is to consider a degree property, then the same rules of property should equally apply.

"We then turn to FL § 8-201(e) for a

definition of marital property. In general, marital property is any property, however titled, acquired by either or both of the parties during the marriage.... Expressly excluded is property acquired by inheritance or gift from a third party, property excluded by valid agreement, or property 'directly traceable' to nonmarital sources. code, Family Law, § 8-201 (e) (Maryland)."

Melrod v. Melrod, 574 A.2d 1,3 (Md.App. 1990).

If the degree is considered to be property, then the rules of property should apply. Duane Baker's parents financed all medical school expenses during his first year, while the Air Force paid for all medical school expenses for the remainder of medical school, plus the Air Force paid a bimonthly stipend (Under 10 U.S.C. § 2120 - 2127 Chapter 105 - "Armed Forces Health Professions Scholarship Program"). This makes the degree property from a party other than the spouse. Therefore, Duane Baker's degree is not marital property, and Donna Baker is not entitled to any portion of that property.

The "Source of Funds Rule" found in Hill v. Hill, 747 S.W.2d 718 and Pope v. Pope, 587 A.2d 481, also helps define marital property.

"Under 'source of funds' rule, property is

considered to be acquired, not when title passes, but as it is paid for.... Incremental property values are allocated proportionately to either marital or separate estates according to source of funds used to purchase property.

Hill v. Hill, 747 S.W.2d 718, 719.

"Appropriate analysis for determining whether property is nonmarital or marital property for purposes of monetary award in divorce proceedings is source of funds theory, rather than inception of title theory."

Pope v. Pope, 587 A.2d 481.

The commencement of the divorce action was on September 8th, 1989. All loan repayments payments made by Duane Baker to his parents were made after the commencement of the lawsuit. The time commitment to the Air Force for payment of entire medical school expenses plus a stipend did not start until after 2 or 3 June 1990 (also after the commencement of the lawsuit). If repayment on the degree started after the divorce action, then no marital funds were used in its acquisition. Therefore, if the degree is considered property and its payment clearly started after the divorce action, it is not "marital property", and Donna Baker is not entitiled to any portion of that property.

Furthermore, degrees are not considered marital property when it would have been obtained with or without the spouse.

"Husband's master's degree in accounting was not property subject to vision in divorce proceeding.....furthermore, husband testified that he would have put himself through school with employment and loans whether married or not."

GrossKoph v. GrossKoph, 677 P.2d 814, 816.

Donna Baker, the plaintiff, admitted that Duane Baker being a medical doctor is "somewhat of a family tradition" when under direct examination by her own attorney. Transcript vol. II pg. 161. This shows that even she recognized that Duane Baker would have become a medical doctor with or without her. Therefore, as in GrossKoph, Duane Baker's degree should not be property subject to division.

This "tradition" was supported by Duane Baker's parents by giving him $80,000.00 for college (transcript vol. V. pg 757) and then giving loans of $74,000.00 for medical school costs, living expences, and other expences (trascript vol. V pg. 758). The testimony is

corroborated by Joyce G. Baker (trans. vol. VI p. 833-872), and not refuted anywhere by the plaintiff. This supports the concept that the degree is a "family tradition". It is natural for professionals to want their children to follow their footsteps and to support those goals.

Therefore, even under the rules of property the State of New York improperly determined that Duane Baker's degree was marital property and improperly awarded his spouse a share of it. This constitutes an unreasonable seizure of property contrary to Amendment IV of the U.S. Contitution.

E. The State of New York improperly included income from extra hours worked from overtime, nights, and holidays, into it's enhanced earning capacity calculations which is contrary to the Thirteenth Amendment of the United States Constitution.

An enhanced earning capacity determination is based on the extra earnings one would achieve solely due to the degree. Common sense dictates

that extra income from extra hours worked is not an enhancement by the degree. It is a product of extra labor by the worker. Therefore, not adjusting for extra hours worked such as overtime, nights, and holidays, in such awards is improper and constitutes slavery.

F. The State of New York improperly awards attorney's fees in enhanced earning capacity cases contrary to contrary to the Fourteenth Amendment of the United States Constitution and other state decisions.

Amendment Fourteen of the United States Constitution Section 1 states

"...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws."

Having the degree holder pay for both sides legal fees in enhanced earning capacity cases deprives the degree holder of "due process" and denies him "equal protection of the laws" as both parties should be placed 'on par' in defending their rights.

"The wife also argues that under the equitable distribution award, husband retains

substantial property. However, counsel fees are not "to be awarded to either spouse automatically... Actual need must be shown in order to justify an award... so that both parties are placed 'on a par' in defending their rights." Dech, 342 Pa.Super. at 23, 492 A.2d at 44; citing Hoover v. Hoover, 288 a.Super. 159, 161-62, 431 A.2.d 337, 338 (1981). The trial court properly concluded that wife had not established actual need for payment of her counsel fees."

Diamond v. Diamond, 519 A.2d 1012, 1019.

"Award of attorney fees in action for equitable distribution, where wife had not been found to be 'dependent spouse,' was not proper."

Patterson v. Patterson, 343 S.E.2d 595, 597.

Having just one party pay for legal fees leads to an inherent unfairness in the negotiation process that leads to abuse. It predisposes the non-paying party to continue to hold out for "pie in the sky" requests at no cost to them. Since the plaintiff's lawyer was paid by the hour it is not in his financial best interest to try to settle the case early. Since the defendant's trial lawyer was paid by the hour, it was not even in his financial best interest to try to settle the case early. It was not even in the defendant's lawyer's financial best interest to win the case at the trial level

as he could collect more money for an appeal. The result is a form of legal blackmail, the defendant either accepts an unreasonable offer, or pays double the amount of escalating legal fees.

In Maloney v. Maloney, 524 N.Y.S.2d 758, the wife was employed earning an annual salary of $17,500 and recieved a distributive award of over $150,000.00. The Supreme Court, Appellate Division, Second department confirmed that she should not be entitled to attorney's fees.

Donna Baker was financially independent, and in her chosen profession, and was making $23,000.00 per year at the date of the trial, and now makes over $25,000.00 per year (Donna Baker trans. vol. IV p. 526-527). The Supreme Court awarded Donna Baker a distributive award of $142,092.00. As in Maloney, Donna Baker should not have been awarded attorney's fees as she is financially independent, earns significantly more than the wife in Maloney, and received a comparable sizable distributive award.

G. Award of attorney's fees is improper

when the actual proceedings were improper.

The defendant should not have to pay the opposing side's attorney's fees in a matters that attempt to violate his own constitutional rights. Instead the plaintiff should pay the defendant's attorney's fees.

H. The State of New York improperly awarded maintenance contrary to Amendment XIII of the United States Constitution.

Maintenance is designed to give the spouse economic independence (see, O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 498 N.Y.S.2d 743, 489 N.E.2d 712), and should continue only as long as is required to render the recipient self-supporting (see, Cohen v. Cohen, 154 A.D.2d 808, 546 N.Y.S.2d 473; Oswald v. Oswald, 154 A.D.2d 817, 818, 546 N.Y.S.2d 475).

De La Torre v. De La Torre, 583 N.Y.S.2d 479, 480, 481.

"Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow 'the recipient spouse an opportunity to achieve (economic) independence' (Assembly Memorandum, 1980 N.Y. Legis. Ann., at 130)"

O'Brien v. O'Brien, 498 N.Y.S.2d 743,747.

The maintenance award therefore should be in an amount and for a time period sufficient to give a spouse reasonable period of time in which to learn or update work skills and to enter

employment market with view to becoming self-supporting. McKinney's DRL § 236, Pt. B, Subd. 6.

Sperling v. Sperling, 567 N.Y.S.2d 538.

In each of the cases above it is clear that the spouse should only recieve maintenance until they are financially independent or self supporting. Donna Baker was already self supporting in her chosen profession at the time of the trial, therefore the award of maintenance was improper and further indentured Dr. Baker into involuntary servitude contrary to Amendment XIII of the United States Constitution.

Furthermore the petitioner wishes to expand a further consideration on this issue in going back to Mahoney, and Lesman,

"Every unsuccessful marriage results in the disappointment of expectations, financial as well as non-financial, but it does not result in a financial loss in a commercial sense. The wife, by contributing to her husband's education, follows a plan agreed upon for the joint benefit of both spouses. 'If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectations by itself as any more compensable or demanding of solicitude than the loss of expectaions of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and

labor in a failed marriage.' (Mahoney v. Mahoney, 182 N.J.Super.598, 614; 442 A.2d 1062, supra.)"

Lesman at 940-941.

Mahoney, and Lesman, both refer to the multifaceted aspects of a marriage; the relationship aspects and the monetary aspects. There is the physical aspect to marriage also. It is improper for New York State or the United States Government to mandate that any aspect of the marriage continue after a divorce as it is involuntary servitude and contrary to Amendment XIII of the United States Constitution. Continuing the monetary aspect of a relationship when the spouse is economically independent and in their chosen profession is improper. It is just as improper as the government ordering any other part of the relationship to continue after the marriage, such as sex.

CONCLUSION

The use of religion to award child custody

is contrary to Dr. Baker's United States Constitution Ammendment I rights. It is imperitive that the United States Supreme Court grant Certiorari as any return of issues back to the trial court are only subject to more of the same unjust coloring of decisions that are evident throughout this case. The petitioner should be allowed to present this case to the Court in order that it's decision will restore his Amendment 1 rights by granting him primary physical and legal custody of his children.

This case also presents for the Court's review the problem with New York States' use of O'Brien, to call a degree property. The State of Florida maintains in Severs, that such determinations "transmute the bonds of marriage into bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution."

Furthermore the State of New York has claimed that a degree is property while other states clearly disagree. Such an award is contrary to the Petitioner's United States

Constitution Amendment IV rights as the State of New York is making an award against property that it has ficticiously created.

The following actions of the State of New York are contrary to Amendment XIV of the United States Constitution.

1) The state cannot award a property determination on something that is not property.

2) To have one side pay for all the attorney's fees in such matters is a violation of due process as both parties need to be placed 'on par' in defending their rights in such cases.

3) Even if one would call a degree property. The New York determination conflicts with the "Source of Funds" rule used in Hill, and Pope. Dr. Baker's degree was totally financed by his parent's and the United States Air Force and no marital funds were used as all repayments were after the commencement of the divorce. In addition Donna Baker admitted that his degree was a family tradition illustrating that he would have obtained it with or without her. The State of New York thus improperly acted to seize this

non-marital property contrary to his Amendment IV and XIV rights.

The State of New YorK improperly imposes maintenance payments when the spouse is economically independent and in their chosen profession. This is just as improper as mandating that any other aspect of a marital relationship be continued post divorce and therefore is contrary to Amendment XIII of the United States Constitution.

It is imperitive that the United States Supreme Court grant Certiorari to allow the Petitioner to present the Court with a case appropriate to render a decision which will abolish the unjust slavery imposed apon him and abolish the unjust costs of depriving him of his constitutional rights.

This practice undoubtably had it's roots from earlier times when divorce was rare and a woman would not have much possibility of finding gainfull employment. Times have changed and

women now have good access to the job market. In fact, many women now have to support their husbands post-divorce. This turnabout is also unjust.

It is respectfully submitted that it is time to put this archaic practice to rest as both parties have access to the job market and continuing support post-divorce truly is involuntary servitude.